U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 July 2006

CASE NO.: 2005-LHC-1451

OWCP NO.: 07-171162

IN THE MATTER OF:

MICHAEL W. CRAFT,

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,

Self-Insured Employer

APPEARANCES:

SUE ESTHER DULIN, ESQ.

For The Claimant

PAUL B. HOWELL, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Michael W. Craft (Claimant) against Northrop Grumman Ship Systems, Inc. (Self-Insured Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice

of Hearing was issued scheduling a formal hearing on March 24, 2006, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Employer proffered nineteen exhibits, Claimant offered nineteen exhibits, eighteen of which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on July 8, 2004.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on July 8, 2004.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___, p.___; Employer's Exhibits: EX-__, p. ___; and Joint Exhibit: JX-___, p. ___. Employer's and Claimant's exhibits contained many duplicates as indicated below. Where duplicates exist, references will generally be made to only one exhibit. The following were duplicates: CX-1 and EX-8, pp. 3-4; CX-3, p. 1 and EX-2; CX-3, p. 2, CX-7, p. 1 and EX-1; CX-4 and EX-5; CX-5 and EX-6; CX-6, pp. 3-5 and EX-4, pp. 1-3; CX-7, pp. 2, 5 and EX-13, pp. 1-2; CX-7, pp. 3-4 and EX-3, pp. 1-2; CX-8, pp. 1-3 and EX-14, pp. 1-3; CX-9, pp. 1-4 and EX-15, pp. 1-4; CX-9, pp. 5-9 and EX-16, pp. 3-7; CX-10, pp. 1-5 and EX-17, pp. 1-5; CX-11, pp. 1-5, 7-15, 17, 18, 25-33A and EX-18, pp. 1-34, 36-40A; and CX-12, pp. 1-7, CX-11, pp. 1, 5, 7, 9-12 and EX-18, pp. 25, 29, 30-34.

5. That Employer filed a Notice of Controversion on July 23, 2004.

6. That an informal conference before the District Director was held on March 16, 2005.

7. That Claimant received temporary total disability benefits from July 12, 2004 through August 22, 2004 at a compensation rate of $415.14.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Determination as to when Claimant reached maximum medical improvement.

3. The reasonableness and necessity of recommended surgery.

4. Claimant's average weekly wage.

5. Entitlement to and authorization for medical care and services.

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Background

On July 8, 2004, Claimant carried a five-gallon bucket of oil up a ladder in order to put oil in a shear machine. While holding the bucket, Claimant lost hold of the bucket and it swung back and hit him in his groin, injuring his groin. Claimant managed to catch the bucket again but suffered an injury to his back in the process. (EX-7, pp. 1-3; EX-19, p. 12). Claimant filed claims for compensation on November 21, 2004 and December 22, 2004. (CX-1, p. 1; EX-7, p. 1).

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing. Claimant is a twenty-seven (27) year old male who currently resides in Irvington, Alabama. (Tr. 21). Claimant graduated from Peter F. Alba High School in 1997. Besides his high school education, Claimant completed agricultural and mechanics courses at a vocational school. (Tr. 22). Claimant's employment history includes employment with Winn-Dixie as a bagger, at the Mobile Dog Track as a lead-out, at Seacore as a deckhand and engineer, with Johnson, Incorporated for whom Claimant worked unloading shrimp boats, and most recently with Employer for whom Claimant worked as an oiler. Claimant began his employment as an oiler with Employer on September 6, 1998 and has been continuously employed by Employer since that date. (Tr. 23-24). Hurricane Katrina did not interrupt Claimant's employment with employer. According to Claimant, he was one of the employees specially selected to stay and secure Employer's shipyard during the hurricane. (Tr. 24, 68).

The duties of an oiler include maintenance of all equipment, cranes, forklifts, machinery, machines, and rolling stock. As an oiler Claimant was required to perform the following physical activities: lift five-gallon buckets of oil, climb ladders, bend, stoop, crawl, twist and turn. He testified further that prior to his injury on July 8, 2004, he had no difficulty performing the physical activities required of him as an oiler. (Tr. 34).

On July 8, 2004, at 2:30 p.m. while working in the east bank pipe shop, Claimant suffered an injury to his lower back and groin when he tried to fill a machine with oil. In order to fill the machine with oil, Claimant had to carry a five-gallon bucket of oil up a ladder. While pouring the oil into the machine, he lost hold of the bucket and reached out and grabbed it. After having done so, the bucket swung and hit Claimant in the groin and caused Claimant to feel something rip in his back. (Tr. 36). He felt a burning sensation in both his back and his groin. Claimant reported his injuries to his acting supervisor, Billy Burlison, that same day. That night at home Claimant treated his injuries with ice and a heat pack. Claimant testified he did nothing at home to hurt his back. (Tr. 37).

On July 9, 2004, Claimant returned to work and reported his injuries to his regular supervisor, Randy Herrington. Claimant

asked Mr. Herrington for a hospital pass for the shipyard hospital to see a doctor. Claimant went to the shipyard hospital and saw Dr. Warfield. (Tr. 38). Dr. Warfield referred Claimant to Dr. West. (Tr. 38-39). F.A. Richard & Associates scheduled an appointment for Claimant to see Dr. West on July 9, 2004. (Tr. 39-40).

At his exam with Dr. West, Claimant presented with complaints of low back pain, pain in his right leg, and pain in his groin. (Tr. 40-41). According to Claimant, Dr. West opined that Claimant was suffering from pulled muscles. He told Dr. West he had a burning sensation in his groin and that he was unable to urinate. Claimant testified that at that point he had not been able to urinate for twenty-four (24) hours. He testified further that his testicles as well as his prostate had swollen and that the swelling in his prostate was so great that it prevented his bladder from functioning properly. Dr. West restricted Claimant to light duty and asked Claimant to return for an additional examination in a few weeks. (Tr. 41). Dr. West also advised Claimant that if his urination problem persisted to go to Providence Emergency Room for treatment. (Tr. 42). After his appointment with Dr. West, Claimant went to F.A. Richard & Associates and gave a statement, but did not sign any forms. (Tr. 39). Claimant also went to Providence for treatment. The treating staff at Providence provided Claimant with a catheter as well as an off-work order and referred Claimant to Dr. Harris, a urologist. (Tr. 42).

Following his treatment at Providence, Claimant contacted F.A. Richard & Associates to advise of his referral to Dr. Harris. F.A. Richard & Associates informed Claimant it would take care of his next appointment with Dr. Harris and asked Claimant to see them after his appointment. (Tr. 42). On July 12, 2004, Claimant had his first appointment with Dr. Harris. Dr. Harris enabled Claimant to urinate without the use of a catheter, prescribed some medications for Claimant, and recommended Claimant stay off-work. (Tr. 43). On July 16, 2004, Claimant went to F.A. Richard & Associates and signed a choice of physician form for both Dr. Harris and Dr. West. (Tr. 39-40, 43-44).

After signing the choice of physician form indicating Dr. West as his choice of physician on July 16, 2004, Claimant attempted to schedule an appointment on July 22, 2004 with Dr. West. Instead of seeing Dr. West on July 22, 2004, Claimant was seen by Dr. Volkman, a partner of Dr. West. Claimant did not sign a choice of physician form for Dr. Volkman. (Tr. 44).

Moreover, Claimant was unsatisfied with the treatment he received from Dr. Volkman as Dr. Volkman prescribed only physical therapy which, according to Claimant, worsened his pain. (Tr. 44-45, 47). Claimant's physical therapist advised Claimant and Dr. Volkman that the prescribed therapy was worsening Claimant's condition and suggested Claimant receive cortisone injections. Dr. Volkman did not pursue another method of treatment but instead continued to prescribe physical therapy. (Tr. 45). In total, Claimant saw Dr. Volkman on July 22, 2004, August 6, 2004 and August 9, 2004, although Claimant had continued to try to see Dr. West. On his August 9, 2004 appointment with Dr. Volkman, Claimant requested a MRI of his back and complained again of the physical therapy worsening his condition. (Tr. 46). Claimant also requested that he be referred to another doctor for treatment. (Tr. 46-47). Dr. Volkman did not refer Claimant to another doctor; rather, Dr. Volkman ceased providing treatment for Claimant. (Tr. 47-48).

Claimant contacted F.A. Richard & Associates following his August 9, 2004 appointment with Dr. Volkman. (Tr. 48, 91-93). He told the adjuster assigned to his claim that Dr. Volkman was not treating him, he was still in pain and that the pain was so bad at times that he could not even get out of bed. The adjuster told Claimant he was only authorized to see Dr. Volkman and if he went to an emergency room for treatment, F.A. Richard & Associates would not pay for the costs of that treatment. (Tr. 48). Claimant testified he tried on several occasions following his August 9, 2004 appointment with Dr. Volkman to schedule appointments with Dr. Volkman and Dr. West, but was told by the doctors' office that he was no longer being seen there. (Tr. 48-49, 89-90).

While Claimant received treatment from Dr. Volkman, Claimant was restricted to light duty. (Tr. 46). After being told that he was no longer being seen by Dr. Volkman, Claimant contacted F.A. Richard & Associates and was advised that he had been released to return to work by Dr. Volkman a few days earlier. According to Claimant, he never received any notification from Dr. Volkman indicating that he was to return to work. Claimant testified that he was nearly fired for not showing up to work. (Tr. 49). Claimant returned to work after he discovered he had been released to return to work. (Tr. 49-50).

On September 10, 2004, Claimant again saw Dr. Harris for pain in his groin. Dr. Harris provided Claimant with an off-work order, prescriptions for Mobic and an antibiotic and

ordered an x-ray and ultrasound of Claimant's groin. (Tr. 50). F.A. Richard & Associates scheduled the September 10, 2004 appointment with Dr. Harris for Claimant but did not provide payment for the concurrent treatment. (Tr. 51). Instead, Claimant used his private health insurance and paid for the treatment himself by either a personal check or credit card payment. (Tr. 51-52; CX-19, p. 2). Claimant spoke with his adjuster at F.A. Richard & Associates who told him that they would pay for Dr. Harris's treatment of Claimant. (Tr. 52-53, 90-91). F.A. Richard & Associates has not reimbursed Claimant for the payments he made to Dr. Harris. (Tr. 53, 91-92). According to Claimant, he has kept F.A. Richard & Associates advised of his continuing treatment with Dr. Harris including the requested ultrasound. (Tr. 53). Claimant testified that he intends to continue treatment with Dr. Harris as he still experiences pain in his groin when he stoops and crawls as well as during intercourse. (Tr. 53-54, 61-62). Claimant further testified that the trauma to his groin has resulted in erectile dysfunction for which he wishes to pursue treatment from Dr. Harris. (Tr. 54).

On October 5, 2004, Claimant saw Dr. Dempsey and presented with complaints of pain in his back and groin. (Tr. 54-55). Dr. Dempsey ordered a CT Myelogram of Claimant's back. (Tr. 55). Claimant met with his adjuster at F.A. Richard & Associates after his appointment with Dr. Dempsey to request authorization to see Dr. Dempsey since Dr. Volkman would not treat him. (Tr. 55-56). The adjuster asked Claimant to provide him with records from Dr. Dempsey regarding Dr. Dempsey's proposed treatment of Claimant, including paperwork pertinent to the proposed CT Myelogram. (Tr. 93). Claimant provided his adjuster with a copy of the requested paperwork. According to Claimant, the adjuster authorized the CT Myelogram yet advised Claimant that he was not going to pay for or authorize treatment with Dr. Dempsey. (Tr. 56, 93-94).

On October 14, 2004, the CT Myelogram of Claimant's back was performed. (Tr. 55-56). The CT Myelogram showed two herniated discs and a pinched nerve. Dr. Dempsey recommended surgery. (Tr. 56). Following this recommendation, Claimant again met with his adjuster at F.A. Richard & Associates to request authorization for treatment from Dr. Dempsey. (Tr. 56-57). The adjuster advised Claimant that he was still not going to pay for or authorize treatment with Dr. Dempsey. (Tr. 57).

On November 16, 2004, Claimant underwent surgery with Dr. Dempsey. Claimant used his private health insurance and paid

for the surgery himself. According to Claimant, Dr. Dempsey repaired his back and he experienced a real good result from the surgery. (Tr. 57). Claimant continued to receive follow-up treatment from Dr. Dempsey and remained off-work until Dr. Dempsey released him to return back to work. (Tr. 58). In Claimant's opinion, the surgery was reasonable and necessary and without it he would not have been able to return to full duty. (Tr. 62-63).

Claimant returned to full duty as an oiler on January 4 or 5, 2005. (Tr. 58-59). Claimant last saw Dr. Dempsey on January 31, 2005 for treatment for minor back pain. (Tr. 59). According to Claimant, Dr. Dempsey told him he had a little scar tissue on the left side of his back but Claimant does not anticipate any further surgeries. (Tr. 60). Claimant continues to receive follow-up treatment from Dr. Dempsey. Dr. Dempsey prescribed Lortab 10 for Claimant which he takes at night. (Tr. 61).

Besides his injury of July 8, 2004, Claimant was injured in an accident in October 1999. (Tr. 34-35). He suffered a broken femur, a broken leg, a broken ankle and a broken hand as a result of the October 1999 accident. Claimant received treatment for these injuries at USA Hospital. According to Claimant, he fully recovered from these injuries and was able to return to full duty without restrictions. He also testified that he suffered an injury to his right shoulder in 2002 while he was working for Employer. Claimant received treatment for this injury from Dr. Andre Fontana, fully recovered and was able to return to full duty. (Tr. 35).

Claimant testified that prior to his injury on July 8, 2004, he worked five to six days a week, eight hours a day with significant overtime. (Tr. 24-25). At the time of his injury, Claimant's hourly rate was $14.23. He was paid straight time for regular hours, time and one-half for working on Saturday, and double time for working on Sunday. (Tr. 25). When Claimant worked on a holiday he was paid for the holiday and paid time and one-half for his services for that day. (Tr. 25-26). As an example, Claimant testified that on November 27, 2003, he was paid sixteen hours, which represented Claimant's holiday pay for the November 27 and November 28, 2003 Thanksgiving holiday. (Tr. 27; CX-6, p. 24). Claimant further testified that on November 28, 2003, he was paid time and one-half for eight hours of work on the holiday. (Tr. 27; CX-6, p. 25). In addition, he was also paid time and one-half for eight hours of work that Saturday, November 29, 2003. (Tr. 27-28; CX-6, p. 25).

Besides the Thanksgiving holiday, Claimant testified he was paid six days of holiday pay for the Christmas holiday in 2003. (Tr. 32; CX-6, p. 27). He also testified that he was paid time and one-half for working on December 29-31, 2003 and January 2, 2004, as those days were holidays. (Tr. 32-33). Claimant testified further that he was paid for eight hours of work on the Good Friday holiday, April 9, 2004. (Tr. 33; CX-6, p. 42).

On cross-examination, Claimant confirmed his date of injury as July 8, 2004, and testified he remained at work from the day after his accident, July 9, 2004, to July 12, 2004 when Dr. Harris ordered him off-work. (Tr. 64-65). He testified that he stayed off-work until a few days after August 19, 2004, the date on which Dr. Volkman recommended he return to work. (Tr. 65). He remained at work from his return in August to September 10, 2004, when Dr. Harris again ordered him off-work. (Tr. 65-66). This time he remained off-work until January 4, 2005, when Dr. Dempsey recommended he return to work. (Tr. 66). Claimant has regularly and continuously worked for Employer, has worked his regular hours, made his regular wage, and worked under the supervision of his regular supervisor, Randy Herrington, since his return to full duty on January 4, 2005. (Tr. 67). He testified he gives "a good days work for a good days pay," has not received any warning slips for doing full work, does not wear any type of brace, and does not take any medication while at work. (Tr. 68).

Claimant further testified he often worked five to six-day weeks in the year preceding his accident. (Tr. 68-69). A five-day week consisted of a regular 40-hour work week while a six-day week consisted of overtime worked after regular hours or on Saturday or Sunday. (Tr. 69-70). Claimant also testified he was off work for a week in July 2003 for a fishing rodeo he attended with his daughter. (Tr. 70). He did not take vacation pay for this week; instead, he took the time off without pay. (Tr. 70-71). Claimant confirmed he received eight hours of pay for holidays or vacation days on which he did not work and time and one-half for holidays on which he did work. (Tr. 71). Claimant acknowledged he received eight hours of pay for Good Friday, April 9, 2004, indicating that he did not work on the holiday as he stated in his direct testimony. (Tr. 71-73; CX-6, p. 42). He also confirmed he received time and one-half for working on December 29-31, 2003 and January 2, 2004. (Tr. 73-74).

Claimant acknowledged he signed a choice of physician form identifying Dr. West as his choice of physician and confirmed Dr. West was his choice of physician. (Tr. 74-75). Nevertheless, he acknowledged seeing Dr. Volkman as Dr. Volkman was in Dr. West's medical group and Dr. West was on vacation or was out of town and unable to see him. (Tr. 75-77). Claimant further acknowledged Employer paid for Claimant's visits with Dr. Volkman as well as his visit with Dr. West. (Tr. 76-77, 78). He testified that he did not refuse to see Dr. Volkman instead of Dr. West because he was in a great deal of pain and needed to see a physician. (Tr. 78). Claimant's last scheduled appointment with Dr. Volkman was August 6, 2004. However, Claimant tried to see Dr. Volkman again on August 9, 2004, in order to try to persuade Dr. Volkman to pursue a different course of treatment or to at least order a MRI. (Tr. 78-80). Dr. Volkman refused to order a MRI presumably because Claimant had a metal rod in his leg. (Tr. 81, 86). Claimant informed Dr. Volkman that the prescribed treatment of physical therapy was worsening his condition and told Dr. Volkman he wanted to obtain a second opinion from another physician. (Tr. 81-83). According to Claimant, Dr. Volkman became upset during this meeting. (Tr. 84-85).

Claimant testified he discussed his desire to see another physician with his adjuster at F.A. Richard & Associates prior to his August 9, 2004 visit with Dr. Volkman. (Tr. 82). The adjuster told Claimant he needed to go back to see Dr. West or Dr. Volkman. (Tr. 82). According to Claimant, after his August 9, 2004 visit with Dr. Volkman he was not able to see either Dr. Volkman or Dr. West as he was told that he was no longer being treated by that office. (Tr. 84, 86). Claimant testified he continuously tried to see Dr. Volkman and Dr. West following his August 9, 2004 meeting with Dr. Volkman to the time preceding his surgery with Dr. Dempsey. (Tr. 86).

On re-direct examination, Claimant testified that in his August 9, 2004 meeting with Dr. Volkman he discussed epidural injections with the doctor. (Tr. 86-87). He confirmed his physical therapist also recommended to Dr. Volkman that he receive epidural injections. Nevertheless, Dr. Volkman chose to continue with the prescribed treatment of physical therapy rather than administer epidural injections. (Tr. 87).

On re-cross examination, Claimant testified he did not request to see Dr. West on August 9, 2004, because he knew Dr. West was not in the office. (Tr. 87-89). Claimant confirmed he was being treated by Dr. Harris for urological problems and that

to the best of his recollection he did not remember being treated by Dr. Harris for a rash or yeast infection. (Tr. 94-96). He also confirmed that as a result of the ultrasound performed at Dr. Harris's request, tumor markers were noted. (Tr. 95). However, he denied being treated by Dr. Harris for cancer and could not say why Employer did not pay for his ultrasound and other x-rays. (Tr. 95-96).

The Medical Evidence

Employer's Shipyard Hospital's Records:

On July 9, 2004, Dr. Warfield with Employer's shipyard hospital examined Claimant who presented with complaints of low back pain and bilateral groin pain greater in his left side than his right side. Upon examination of Claimant, Dr. Warfield noted Claimant tilted to the right, had range of motion with flexion and extension, and that his reflexes were "okay." Dr. Warfield also noted Claimant's left epididymal was tender but not swollen. Dr. Warfield prescribed 200 milligram Ibuprofen tablets for Claimant and recommended Claimant not lift anything heavier than twenty-five (25) pounds with any degree of frequency. In addition, Dr. Warfield recommended Claimant not bend or stoop for the rest of the day. (CX-7, p. 2). Dr. Warfield provided Claimant with a work restriction order to the same effect, namely, no lifting over twenty-five (25) pounds, no stooping or bending for one day.[2] (CX-7, p. 5).

Dr. West's Records:

On July 9, 2004, Dr. West examined Claimant who presented with complaints of pain in his thoracic spine thoracolumbar junction and pain in his scrotum. On examination of Claimant, Dr. West noted a thoracolumbar spasm, tenderness, and decreased range of motion. X-rays indicated no instability and Dr. West found Claimant to be neurologically intact. Dr. West suspected Claimant might be suffering from a hernia with difficulty voiding. Dr. West told Claimant that should his difficulty voiding continue, he should immediately go to the emergency room. Claimant was placed on light duty and instructed not to

[2] Claimant testified he was referred to Dr. West by Dr. Warfield. (Tr. 38-39). However, a notation in the shipyard hospital's records dated July 9, 2004, authored by Dr. Warfield indicates Claimant was referred to F.A. Richard & Associates. (CX-7, p. 2). After which F.A. Richard & Associates scheduled Claimant's appointment with Dr. West. (Tr. 39-40).

lift anything heavy, bend or twist. In addition, Dr. West prescribed Mobic, Darvocet, and Soma for Claimant as well as physical therapy. Claimant was instructed to return for a follow-up appointment in a week. (CX-9, pp. 1-4).

Providence Hospital's Records:

On July 9, 2004, Dr. Goodwin with Providence Hospital examined Claimant in the emergency room of the hospital. (CX-8, p. 1). Claimant complained of dysuria, back pain and retention of urine. (CX-8, pp. 1, 3). Dr. Goodwin provided Claimant with a catheter as well as prescriptions for Levaquin and Lortab. (CX-8, pp. 2-3). Dr. Goodwin also provided Claimant with an off-work order indicating Claimant was not to return to work until permitted to do so by Dr. Kidd.[3] (CX-8, p. 2).

Dr. Volkman's Records:

On July 22, 2004, Dr. Volkman, in Dr. West's absence, examined Claimant who presented with complaints of pain at the thoracolumbar junction. Dr. Volkman noted Claimant had no radiation of pain and had been seeing a urologist. Dr. Volkman also noted that Claimant had not filled his Mobic prescription or attended any of his prescribed physical therapy appointments. Dr. Volkman scheduled additional physical therapy sessions for Claimant and asked Claimant to fill his Mobic prescription. Dr. Volkman recommended that Claimant remain on light duty and return for a follow-up appointment with Dr. West in two weeks. (CX-9, pp. 5-6).

On August 6, 2004, Dr. Volkman again examined Claimant. Claimant presented with complaints of axial pain at the thoracolumbar junction. Dr. Volkman found Claimant had no discomfort radiation and noted Claimant was taking his Mobic and continuing with physical therapy. Claimant told Dr. Volkman physical therapy was not helping but that he would continue. Claimant also told Dr. Volkman he was not working, but Dr. Volkman noted, in his opinion, Claimant's light duty restrictions remained. Claimant was to return for a follow-up appointment in two to three weeks. (CX-9, p. 7).

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[3] While Dr. Goodwin noted Claimant was not to return to work until he was released by Dr. Kidd, there is no other mention of Dr. Kidd in the record. However, it is clear from the record that following his treatment at the hospital emergency room, Claimant obtained treatment for his urinary problem and groin pains from Dr. Harris.

On August 9, 2004, Dr. Volkman met with Claimant. Claimant told Dr. Volkman he was no better and that his symptoms had not improved. Claimant and Dr. Volkman discussed the possibility of a MRI scan and Claimant's desire to follow-up with Dr. Fontana.[4] No further treatment was implemented since Claimant desired to follow-up with another physician. Subsequently, Dr. Volkman completed a notice indicating he had examined Claimant on August 9, 2004, and that Claimant was able to return to full duty on August 19, 2004. (CX-9, pp. 8-9).

Dr. Harris/Mobile Urology's Records:

On July 12, 2004, Dr. Harris examined Claimant who presented with complaints of pain in his genitalia and an inability to urinate. Dr. Harris prescribed an anti-inflammatory agent for Claimant and ordered some tests. Dr. Harris noted Claimant was provided with a catheter on July 9, 2004, and suggested Claimant be given a trial at urinating without the catheter. Dr. Harris ordered additional x-rays and found Claimant could not return to full duty at that time. On July 15, 2004, Dr. Harris reviewed results of the tests taken on July 12, 2004. Dr. Harris noted that the results looked good. (CX-10, p. 1).

On September 10, 2004, Dr. Harris examined Claimant who presented with complaints of left scrotal pain. Claimant told Dr. Harris the pain developed after he climbed down off a piece of machinery. Claimant denied he suffered from dysuria, gross hematuria, change in voiding patterns, back pain, or fevers. Upon examination of Claimant, Dr. Harris found an apparent flare up of Claimant's left epididymitis. Dr. Harris provided Claimant with an off-work order as well as prescriptions for Celebrex and Cipro. Claimant was to follow-up with Dr. Harris in seven to ten days. Claimant had, but did not keep, a scheduled appointment with Dr. Harris on September 21, 2004. (CX-10, p. 2).

On October 1, 2004, Dr. Harris examined Claimant who again presented with complaints of left scrotal pain. Claimant told Dr. Harris his scrotal pain was exacerbated by activities at work as well as intercourse and that the Celebrex and

[4] Although Dr. Volkman's note identifies Dr. Fontana as the physician Claimant wished to see, Claimant testified he told Dr. Volkman he wished to see Dr. Dempsey, not Dr. Fontana. (Tr. 88).

antibiotics had not helped. On examination of Claimant, Dr. Harris found Claimant's complaint of pain did not match his physical exam. Dr. Harris provided Claimant with an off-work order, asked Claimant to continue with his Celebrex prescription, and prescribed Doxycycline and Lortab #12. Dr. Harris also recommended Claimant undergo an Alpha-fetoprotein, Beta HCG and a scrotal ultrasound. In addition, Dr. Harris noted that if the results of those tests were negative, Claimant should be referred to chronic pain management or a neurologist. (CX-10, p. 3).

On October 8, 2004, Dr. Harris again examined Claimant who presented with complaints of scrotal pain. At this appointment, Dr. Harris reviewed the scrotal ultrasound which showed no obvious testicular problems, but did show an epididymal cyst/spermatoclel and bilateral hydroceles. After examining Claimant, Dr. Harris opined the epididymal cyst/spermatoclel was not causing Claimant's scrotal pain. Dr. Harris also noted as time progressed his initial opinion that Claimant's scrotal pain was caused by epididymis was becoming less likely. Instead, Dr. Harris thought Claimant's complaints of pain were more likely neurological. Dr. Harris requested tumor markers and referred Claimant to a neurologist which he considered appropriate particularly since Claimant was seeing an orthopedic surgeon for his back. (CX-10, pp. 4-5).

Dr. Dempsey/Mobile Infirmary's Medical Records:

On October 5, 2004, Dr. Dempsey examined Claimant who presented with complaints of pain in his back.[5] Upon examination of Claimant, Dr. Dempsey found Claimant to have a positive straight leg raise on the left, a negative straight leg raise on the right, normal knee and ankle jerk reflexes with no muscle atrophy or weakness in the lower extremities, and approximately 50% range of motion of the lumbar spine. Dr. Dempsey reviewed a x-ray of Claimant's back which showed some mild reversal of the normal lordosis. Dr. Dempsey diagnosed Claimant as suffering from low back pain with radiculopathy. He ordered a CT Myelogram and provided Claimant with a prescription for Lortab as well as an off-work order. (CX-11, pp. 1-2).

[5] Although Claimant did not testify to such, it appears as though Claimant knew Dr. Dempsey through his association with Dr. Fontana, Claimant's former treating physician. (Tr. 35; CX-16, pp. 3, 5, 7).

The requested CT Myelogram of Claimant's back was performed on October 14, 2004. The CT showed a small central/left paracentral disc protrusion/extrusion at the L5-S1 level having mild mass effect upon the left S1 nerve root. The Myelogram showed normal alignment of the lumbar spine, no evidence of spinal or forminal stenosis, and no significant extradural effects. (CX-11, pp. 3-4). On November 2, 2004, Dr. Dempsey again examined Claimant who presented with complaints of severe pain in his back and down his leg. Dr. Dempsey discussed treatment options with Claimant of which Claimant chose surgery. Consequently, Claimant was scheduled for a microdiscectomy. In addition, Dr. Dempsey provided Claimant with an off-work order. (CX-11, pp. 5-6). Claimant underwent the requested microdiscectomy on the right side at the L5-S1 level on November 16, 2004. (CX-11, pp. 7, 10).

On December 21, 2004, Dr. Dempsey had a follow-up appointment with Claimant. Claimant still complained of a little pain down his leg, but his surgical wound was well healed, he had normal reflexes, and no muscle atrophy or weakness in his lower extremities. Dr. Dempsey provided Claimant with a prescription for Gabitril and recommended that he return in January for a follow-up appointment. (CX-11, p. 11). Claimant saw Dr. Dempsey on January 3, 2005, who found Claimant's surgical wound to be well healed and found Claimant had a negative straight leg raise. Dr. Dempsey further found that Claimant was ready to return to full, unrestricted activities. Dr. Dempsey released Claimant to full duty on January 4, 2005. (CX-11, p. 12).

Following his recovery from the microdiscectomy, Claimant saw Dr. Dempsey on January 27, January 31, April 14, April 19, and June 2, 2005 for follow-up appointments. Dr. Dempsey noted Claimant's surgical wound was well healed but that Claimant continued to suffer from some pain. On January 27, 2005, Dr. Dempsey provided Claimant with a prescription for Nortriptyline. On January 31, 2005, Claimant was given neurogenic cream to use around his surgical scar. On April 14, 2005, Claimant's prescription for Nortriptyline was changed to Lortab. Claimant complained to Dr. Dempsey on April 19, 2005 that the pain in his right leg and right gluteal area was progressively worsening. Dr. Dempsey ordered a MRI scan of Claimant's lumbar spine and gave Claimant some Toradol and Depo-Medrol. The requested MRI was performed on May 7, 2005 and showed an interval left-sided hemilaminectomy at L5-S1 with bony fusion of the posterior elements at L5-S1 and borderline congenital narrowing of the central canal. (CX-11, pp. 13-18, 33-A).

On June 2, 2005, Dr. Dempsey completed a Certification of Health Care Provider for Medical or Family Care Leave form, indicating Claimant required an undetermined absence from work because of a herniated lumbar disc. (CX-11, pp. 19-20). In a letter from Claimant's counsel dated January 30, 2006, Dr. Dempsey agreed that Claimant reached maximum medical improvement following his surgery of November 16, 2004, and assigned a 5% impairment to Claimant's body as a whole.[6] (CX-11, pp. 22-23).

The Wage and Earnings Evidence

Prior to his injury on July 8, 2004, Claimant worked five to six days a week, eight hours a day with significant overtime. (Tr. 24-25). At the time of his injury, Claimant's hourly rate was $14.79.[7] (CX-6, p. 4). He was paid straight time for regular hours, time and one-half for working on Saturday, and double time for working on Sunday. (Tr. 25). When Claimant worked on a holiday he was paid for the holiday and paid time and one-half for his services for that day. (Tr. 25-26).

Claimant's earnings records indicate that from July 7, 2003 to July 4, 2004, he was paid straight time for 1819.9 regular hours, straight time for 88.0 vacation hours, time and one-half for 296.7 overtime/holiday hours, and double time for 39.0 overtime hours, resulting in a gross annual income of $34,905.69. (CX-6, p. 1). Claimant's earnings records also indicate that from July 13, 2003 to July 4, 2004, he was paid straight time for 1787.9 regular hours, straight time for 88.0 vacation hours, time and one-half for 292.7 overtime/holiday hours, and double time for 39.0 overtime hours, resulting in a gross annual income of $34,365.33. (CX-6, pp. 3-4).

The Contentions of the Parties

Claimant contends he was temporarily totally disabled from the date of his injury on July 8, 2004, until he returned to work on August 23, 2004, and again when he was placed off work by Dr. Harris on September 10, 2004, until he returned to work without restrictions on January 4, 2005. Accordingly, Claimant

[6] Although Dr. Dempsey agreed Claimant reached maximum medical improvement (MMI) following his surgery, he did not identify an exact date when Claimant reached MMI. (CX-11, p. 22).

[7] This rate reflects Claimant's hourly rate of pay as of July 2004. Prior to July 2004, Claimant's hourly rate was $14.22. (CX-6, pp. 3-4).

maintains he was entitled to temporary total disability benefits for the periods of July 8, 2004 to August 22, 2004 and September 10, 2004 to January 4, 2005. In addition, Claimant contends he reached maximum medical improvement on January 31, 2006, when he last saw Dr. Dempsey. Claimant also argues the recommended microdiscectomy performed on November 16, 2004, was reasonable and necessary. Claimant had a good result from the surgery and maintains he would not have been able to return to full duty without the surgery.

Moreover, Claimant asserts neither Section 10(a) nor 10(b) of the Act can fairly and reasonably be applied to determine his average weekly wage since he was both a five and six-day a week worker. Instead, Claimant asserts that 10(c) of the Act should be used to determine his average weekly wage. Claimant contends his average weekly wage under 10(c) was $712.36; or, in the alternative should the Court determine 10(a) can fairly and reasonably be applied, his average weekly wage was $734.94. Claimant also argues he is entitled to payment and reimbursement of the bills and expenses associated with the treatment provided by Dr. Dempsey since Drs. West and Volkman refused to treat him. In addition, Claimant contends he is also entitled to payment and reimbursement of the bills and expenses associated with the treatment provided by Dr. Harris since Employer authorized treatment but either delayed payment or failed to pay altogether.

Employer contends Claimant was temporarily totally disabled from the date of his injury on July 8, 2004 until he was released to work on August 19, 2004, but concedes the Court may find Claimant was also temporarily totally disabled from September 10, 2004 to January 4, 2005. Employer asserts Claimant was paid all compensation due and owing for the period of July 8, 2004 to August 19, 2004. In addition, Employer argues that Claimant is not entitled to any permanent disability benefits since Claimant returned to work at his regular job, earning his regular wage.

Furthermore, Employer contends Claimant reached maximum medical improvement on August 19, 2004, the date on which Dr. Volkman released Claimant to full duty; or, in the alternative January 3, 2005, when Dr. Dempsey released Claimant to full duty. As for Claimant's average weekly wage, Employer maintains Section 10(a) of the Act applies and using 10(a) the Court should find Claimant's average weekly wage to either be $622.70 or $630.05. In addition, Employer also maintains it is not responsible for payment of treatment provided by Dr. Dempsey

since it did not consent to a change of physician and since it was Claimant's choice of physician which refused treatment, not Employer's. Employer further maintains it is not responsible for payment of the unpaid bills related to the treatment provided by Dr. Harris since the treatment in issue was unrelated to Claimant's injury or was unreasonable and unnecessary.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968). Here, based on the record as a whole and my observations of the witness, I am convinced that Claimant is a sincere and honest witness who has demonstrated an extraordinary desire to return to work.

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The

permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or

permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant contends he reached maximum medical improvement on January 31, 2006, when he last saw Dr. Dempsey. Employer, on the other hand, contends Claimant reached maximum medical improvement on either August 19, 2004, when Claimant was released to full duty by Dr. Volkman, or on January 4, 2005, when Claimant was released to full duty by Dr. Dempsey. Dr. Dempsey was the only physician to address maximum medical improvement. However, Dr. Dempsey did not identify an exact date as to when he believed Claimant reached maximum medical improvement.

Maximum medical improvement requires stabilization of Claimant's condition. Since Claimant was restricted from working on September 10, 2004, after being released to full duty on August 19, 2004, for the same physical complaints expressed prior to his release to full duty, he could not have reached maximum medical improvement on August 19, 2004, as Employer contends. Certainly Claimant reached maximum medical improvement prior to and not on January 31, 2006, as Claimant contends, since Claimant's condition has remained fairly constant following his recovery from the microdiscectomy performed on November 16, 2004. From the record, it is clear

and I find that Claimant reached maximum medical improvement on January 4, 2005, when he was released to full duty following his successful recovery from the microdiscectomy.

Although Claimant reached maximum medical improvement on January 4, 2005, Claimant was restricted from working at all for the periods of July 8, 2004 to August 19, 2004, and September 10, 2004 to January 4, 2005. As such, Claimant was unable to perform his regular duties as an oiler for Employer. However, since Claimant reached maximum medical improvement he has returned to work performing his regular duties and earning his regular wage. Therefore, Claimant is neither permanently partially nor totally disabled. Since Claimant could not perform his regular job duties, or any job duties for that matter, from July 8, 2004 to August 19, 2004, and September 10, 2004 to January 4, 2005, I find Claimant was temporarily totally disabled during those time periods.

C. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. §910(a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. §910(a). In Duncan v. Washington Metro. Area Transit Authority, 24 BRBS 133, 136 (1990), the Board considered 34.5 weeks of "full-time," "steady" or "regular" employment to be "substantially the whole of the year." Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). If neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c)

is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) are similar in that they both are a **theoretical approximation** of what the claimant could ideally be expected to earn, ignoring time lost due to strikes, illness, personal business, etc., thus tending to give a higher figure than what the employee actually earned. Duncan v. Washington Metro. Area Transit Authority, supra, at 136. Section 10(a) differs from Sections 10(b) and (c) in that it looks to the **actual wages** of the injured worker to determine the amount of compensation. Thus, Section 10(a) cannot be applied where there is no evidence from which the average daily wage can be calculated. Lobus v. I.T.O. Corp. of Baltimore, supra, at 140; Taylor v. Smith & Kelly Co., 14 BRBS 489, 495 (1981).

To calculate average weekly wage under Section 10(a), the claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period to determine an average daily wage. The average daily wage is multiplied by 300 for a six-day worker or 260 for a five-day worker and the result is divided by 52 pursuant to Section 10(d) to determine the average weekly wage. 33 U.S.C. §910.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., 23 BRBS 389 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning

capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra.

It is well-settled that vacation or holiday pay calculated in the year in which it is received, rather than the year in which it is earned is considered a wage. Duncan v. Washington Metro. Area Transit Authority, supra, at 9; Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F. 2d 836 (5th Cir. 1983). However, where a claimant receives additional monetary compensation in exchange for return of unused vacation hours, the determination of the days worked for purposes of calculating average daily wage does not include additional days derived from those hours. Wooley v. Ingalls Shipbuilding, Inc., 33 BRBS 88 (1999), aff'd, 204 F. 3d 616 (5th Cir. 2000). In other words, vacation days "sold back" are not considered as days worked for the purposes of determining average weekly wage while vacation days taken are. Ingalls Shipbuilding, Inc. v. Wooley, 204 F. 3d at 618.

In the present matter, the parties differ as to which Section, Section 10(a) or (c), is the applicable statutory provision to calculate Claimant's average weekly wage. Claimant proposes under Section 10(c) the total of his gross earnings from July 7, 2003 to July 4, 2004 be divided by his actual weeks worked as his average weekly wage. ($34,905.69 ÷ 49 = $712.36). In the alternative, Claimant proposes under Section 10(a) the total of his gross earnings from July 7, 2003 to July 4, 2004 be divided by 274 days worked (260 work days + 11 vacation days + 3 holidays not worked in lieu of time off) multiplied by 300 (six-day/week worker) and divided by 52 as his average weekly wage. ($34,905.69 ÷ 274 = $127.39 for a daily wage × 300 = $38,217.91 ÷ 52 = $734.96).[8]

On the other hand, Employer proposes under Section 10(a) the total of Claimant's gross earnings from July 13, 2003 to July 4, 2004 be divided by his total hours worked multiplied by 8 then multiplied by 260 (five-day/week worker) and finally divided by 52 as his average weekly wage. ($34,365.33 ÷ 2207.6 hours = $15.567 for an hourly wage × 8 = $124.534 for a daily wage × 260 = $32,379.00 ÷ 52 = $622.67). In the alternative, Employer proposes under Section 10(a) the total of Claimant's

[8] There is a slight error in Claimant's calculation of his proposed average weekly wage under Section 10(a). Claimant determined his average weekly wage under 10(a) to be $734.94. My calculations indicate that under the proposed calculation, Claimant's average weekly wage should be $734.96.

gross earnings from July 7, 2003 to July 4, 2004 be divided by 277 days worked multiplied by 260 (five-day/week worker) and divided by 52 as his average weekly wage. ($34,905.69 ÷ 277 = $126.01 as a daily wage × 260 = $32,763.46 ÷ 52 = $630.07).[9]

Claimant relies on Wooley in support of his position that the "actual number of days worked" (excluding holidays worked in lieu of time off) is the appropriate divisor to be used to calculate average daily wage. Wooley v. Ingalls Shipbuilding, Inc., supra. However, the facts in Wooley can be both distinguished and construed against Claimant.

In Wooley, the claimant was permitted to treat 120 hours as four "vacation days," by which his gross annual earnings would be divided to determine average weekly wage and "sell back" eleven days to his employer which would not be treated as "days worked." Based on this holding, Claimant argues that the six holidays worked in lieu of time off be excluded from his "actual number of days worked." Id. at 90.[10] However, in the instant case, Claimant did not "sell back" vacation, but instead was paid time and one-half for working on holidays in lieu of time off during the period used to calculate average weekly wage. A decision to exclude these holidays from "actual number of days worked," yet include the compensation in the sum of the gross annual earnings is inconsistent with Wooley.

Under these facts, strict adherence to Wooley would require that both vacation/holiday compensation and the corresponding "days" be included in the computation of average weekly wage. However, in Wooley, the Board followed the rationale of the Fourth Circuit Court of Appeals in Universal Maritime Corp. v. Moore, 126 F. 3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997), declining to create a bright-line rule regarding how all vacation compensation would be treated under Section 10(a). Rather, the Board decided to confer discretion onto the Administrative Law Judge to conduct a fact-intensive analysis to determine whether vacation compensation counts as a "day worked"

[9] There is a slight error in each of Employer's calculations of Claimant's proposed average weekly wage under Section 10(a). Employer determined Claimant's average weekly wage to be $622.70 or $630.05. My calculations indicate that under the proposed calculations, Claimant's average weekly wage should be $622.67 or $630.07.

[10] In Wooley, it is noteworthy that the claimant counted as a day worked individual dates on which claimant received wages or **paid vacation time**. Id. at 91 n. 2.

or whether it was "sold back" to the employer for additional pay. Wooley, at 90.

The facts presented in this case do not support a finding that holiday compensation was "sold back," thus creating a need to eliminate these "days" from the divisor. Rather, like Wooley, days "worked" should include actual days worked or days for which vacation or holiday pay was received. Therefore, I find Wooley does not bar inclusion of the six holidays Claimant worked in lieu of time off in a computation of his average weekly wage.

Besides proposing the exclusion of holidays worked in lieu of time off from his average weekly wage calculation, Claimant also proposes he be considered a six-day a week worker for any determination under Section 10(a). Employer, on the other hand, proposes Claimant be considered a five-day a week worker. The wage and earnings evidence presented by the parties reveals that Claimant worked both five-day and six-day weeks. While it appears Claimant may have worked more five-day weeks than six-day, the evidence is such that I am unable to determine with any degree of accuracy which standard Claimant met.

In addition, Claimant and Employer differ as to how many days Claimant actually worked in the 52 weeks preceding his injury. Unfortunately, the wage and earnings evidence presented is incomplete as far as Claimant's days actually worked is concerned. As such, I am unable to determine Claimant's days actually worked in the 52 weeks prior to his injury. Thus, I conclude Section 10(a) of the Act cannot be applied, and find that Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Therefore, in calculating Claimant's average weekly wage, his gross annual earnings shall be divided by 52 weeks to achieve his average weekly wage of $671.26. ($34,905.69 ÷ 52 = $671.26). Based on the average weekly wage, his rate of compensation is determined to be $447.46. ($671.26 × .6666 = $447.46). I find this method of computing average weekly wage to be fair and rational under applicable case law and provisions set forth in Section 10(c).

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. §702.402. A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury in order to be entitled to such treatment at employer's expense. Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the claimant to be released from the obligation of seeking his

employer's authorization of medical treatment. See generally 33 U.S.C. §907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

When a treating physician selected by the employer declares the claimant is recovered and discharged from treatment, such declaration may be tantamount to the employer's refusing to provide treatment. Shadahy v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(finding a refusal to provide medical treatment on behalf of the employer when the employer's physician told the claimant that he had recovered from his injury and required no further treatment); Atlantic Gulf Stevedores, Inc. v. Newman, 440 F.2d 908 (5th Cir. 1971)(same); Gros v. Fred Settoon, Inc., 35 BRBS 343 (ALJ)(2001). However, when a claimant's treating physician refuses to provide further medical treatment, it does not relieve the claimant of the obligation to request another choice of physician from his employer under Section 7(b). Slattery Associates, Inc. v. Hartford Accident & Indemnity Co, 725 F.2d 780, 786 (D.C. Cir. 1983). A physician is considered an employer's physician when the relationship between the physician and the employer is such that "it is reasonable to assume that the employer will adopt or has adopted the doctor's medical conclusions." Id. at 785. Under such circumstances, a claimant would be "justified in concluding from the fact that the *doctor* tells him that he is recovered and requires no further treatment that the *employer* will refuse to provide or authorize further treatment if requested." Id. (emphasis in original).

When a claimant wishes to change treating physicians, the claimant must first request consent for a change, and consent shall be given in cases where a claimant's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a) (2004); Armfield v. Shell Offshore, Inc., 25 BRBS 303, 309 (1992) (Smith, J., dissenting on other grounds); Senegal v. Strachan Shipping Co., 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent upon a showing of good cause for change. 33 U.S.C. §907(c)(2). However, "'[t]o relieve the employer of the

liability for necessary employment related medical expenses merely because a claimant has failed to request permission to change physicians after effectively being refused any further medical treatment is not within the spirit of the Act.'" Slattery Associates, Inc. v. Hartford Accident & Indemnity Co, supra (quoting, George O. Buckhaults, 2 BRBS 27, 280 (1975)).

Though the plain language of Section 7(c)(2) states that the employer may consent to a change of physician for good cause, an employer is not required to. Swain v. Bath Iron Works Corp., 14 BRBS 657, 665 (1982)(stating that even if the claimant had established "good cause" for change the employer was not required to authorize the change). In such cases, the district director of the appropriate compensation district may order a change of physicians when a change is "necessary or desirable." 20 C.F.R. §702.406(b) (2004).

Jurisprudence has established several instances where the claimant failed to even demonstrate "good cause" for change. See Lyles v. Stevedoring Services of America, 34 BRBS 303, 305-06 (ALJ)(2000)(denying the claimant a right to change physicians for "good cause" when the claimant was already being treated by a specialist and only sought to change specialists after being released to return to work); Mull v. Newport News Shipbuilding & Dry Dock Co., 29 BRBS 739, 741-43 (ALJ)(1995)(no "good cause" to change physicians exists when the claimant consciously chose a treating physician, that physician treated her for seven months, she chose another specialist in the same field without gaining approval from the employer, and when she only sought to change physicians after the first physician opined that her injuries were not work-related); Cf. Baily v. Palmetto Shipbuilding & Stevedoring Co., 27 BRBS 370 (ALJ)(1993)(finding that the death of the claimant's prior treating physician constituted "good cause" to change treating physicians); Gaudet v. New Orleans Shipyard, 24 BRBS 31 (1990) (ALJ)(finding the employer was required to consent to a change in physicians for "good cause," and labeling the change as a "referral" when the claimant sought a change of orthopedist for a specific purpose, namely that the second orthopedist was a "leading spine surgeon" who was more capable of performing the particular operation).

In the instant case, Claimant was referred to Dr. West's office by Employer following his examination by Employer's shipyard physician. His initial appointment with Dr. West on July 9, 2004, was arranged by Employer. On July 16, 2004, he signed a choice of physician form identifying Dr. West as his choice of physician for treatment of his back injury. Claimant

did not see Dr. West after he signed the choice of physician form. Instead, he saw Dr. Volkman, a partner of Dr. West's, on three occasions. However, Claimant at no time ceased trying to see Dr. West for treatment. Rather, he agreed to see Dr. Volkman because he was in a great deal of pain, was told that Dr. West was either out of town or unavailable, and was instructed to do so by Employer. Dr. Volkman prescribed physical therapy for Claimant and refused to consider alternate forms of treatment. Dr. Volkman persistently refused to consider alternate forms of treatment despite Claimant telling him that physical therapy worsened his pain and Claimant's physical therapist suggesting Dr. Volkman consider epidural injections. Besides refusing to consider alternate forms of treatment, Dr. Volkman also refused to consider obtaining diagnostic tests of Claimant's back.

Claimant kept Employer informed of his treatment with Dr. Volkman. On August 9, 2004, Dr. Volkman refused to further treat Claimant following a disagreement with him regarding treatment. Instead, Dr. Volkman provided Employer, not Claimant, with a notice indicating he had examined Claimant on August 9, 2004, and that Claimant would be able to return to full duty on August 19, 2004. Following this disagreement and refusal of treatment, Claimant sought authorization from Employer to see another physician. Employer refused authorization and told Claimant he was only authorized to see Dr. West or Dr. Volkman. Employer also told Claimant it would not pay for any services obtained by Claimant from an emergency room facility.

Employer argues Dr. West and Dr. Volkman, presumably vis-à-vis his professional relationship with Dr. West, were Claimant's choice of physician. These physicians, according to Employer, were Claimant's physicians since Claimant signed a choice of physician form identifying Dr. West as his choice. Therefore, Employer contends Claimant was restricted to seeking treatment from these physicians. As Claimant's physicians, Employer argues any refusal of treatment by them cannot be imputed to Employer. Employer also argues since Drs. West and Volkman were Claimant's physicians it was not required to consent to a change of physician under the Act. I disagree.

Employer presented no evidence or legal precedent to support its contention that Dr. Volkman was "Claimant's physician." Instead, Employer intimates that Claimant's choice of physician form for Dr. West operated to identify Dr. West's medical group as Claimant's choice. This is simply not so.

Claimant identified Dr. West as his choice of physician, not his group. In addition, there is no evidence in the record to indicate that Claimant acquiesced to Dr. Volkman as his physician. Rather, the record clearly indicates Claimant never stopped trying to see Dr. West for treatment, neither during his treatment with Dr. Volkman nor after Dr. Volkman's refusal to treat him.

Nevertheless, even if I were to find Dr. Volkman to have been Claimant's choice of physician, such a finding would not be determinative. For, in this case, a finding as to whether Dr. Volkman or Dr. West was Claimant's choice of physician does not preclude a conclusion that Claimant was refused treatment.

Employer relies upon Slattery to support its contention that refusal of treatment by *Claimant's* physician cannot be imputed to Employer. While in some cases reliance upon this argument may be meritorious, reliance on the argument here is not. This argument inevitably requires an analysis of the record in order to determine if a physician is properly characterized as a "claimant's physician." Should one choose to advance this argument, one should be certain that the record supports such a finding since ultimately a physician may be found not to be a "claimant's physician." In which case, refusal of treatment is properly imputed to the employer.

In the instant case, Claimant was referred to Dr. West by Employer. Employer instructed Claimant to see Dr. Volkman. Several appointments with these physicians were scheduled by Employer. Dr. Volkman refused Claimant treatment following a disagreement over treatment after which he provided a notice regarding Claimant's release to full duty to Employer, not Claimant. Dr. West also refused to treat Claimant following the disagreement with Dr. Volkman. Most importantly, however, Claimant was told by Employer to return to full duty after his release by Dr. Volkman despite Claimant telling Employer he was still in pain and wanted to see another physician because he was being refused treatment.

Under these facts, application of Slattery compels a finding that Drs. Volkman and West are Employer's physician(s), not Claimant's since Employer adopted their medical conclusions and instructed to Claimant to return to full duty. Therefore, Drs. Volkman and West's refusal to treat Claimant is imputable to Employer. As such, Claimant was released from his obligation under the Act to seek Employer's authorization for treatment. Under these circumstances, Claimant need only show the treatment

he obtained on his own initiative was reasonable and necessary to treat his work-related back injury.

Claimant sought treatment for his back pain from Dr. Dempsey after Drs. Volkman and West refused to treat him. Dr. Dempsey ordered a CT Myelogram of Claimant's back which showed two herniated discs and a pinched nerve. Dr. Dempsey discussed treatment options with Claimant after which, Claimant chose surgery. Claimant successfully recovered from his surgery in January 2005 and was subsequently released to full duty. Claimant testified he had a real good result from the surgery, the surgery repaired his back, and without the surgery he would not have been able to return to full duty. In addition, Dr. Dempsey agreed that Claimant reached maximum medical improvement following this surgery.

On the other hand, Drs. Volkman and West provided no information regarding Claimant reaching maximum medical improvement. More importantly, Drs. Volkman and West never indicated Claimant was being treated for anything other than pulled muscles or a hypothesized hernia. Perhaps had Drs. Volkman and West continued to treat Claimant or ordered diagnostic tests beyond the initial x-rays, there might have been information in the record to suggest Claimant's treatment with Dr. Dempsey was not reasonable and necessary. However, since Drs. Volkman and West refused to further treat Claimant, there is no such information in the record. According to the information in the record, Claimant suffered a work-related back injury and was able to return to full duty following successful recovery from surgery. Based on the evidence of record, I find the treatment Claimant obtained from Dr. Dempsey was reasonable and necessary treatment of his work-related back injury.

Moreover, had the record not supported a finding of Drs. Volkman and West as Employer's physician(s), Claimant would nonetheless be entitled to medical benefits. While Slattery may not excuse a claimant from attempting to obtain approval from an employer in order to change physicians as Employer acknowledges, it does not prohibit Claimant from obtaining medical treatment if treatment is refused by his choice of physician. Such a proposition would be wholly inconsistent with the purpose of the Act. The Act may limit a claimant's choice of physician, but was not designed to prevent a claimant from receiving treatment. Had that been the case, surely the Act would not have provided for a change of physician. Therefore, regardless of whether Dr. Volkman was "Claimant's physician," the fact Claimant was refused treatment remains.

In the instant case, Claimant did not seek to change physicians merely because he was unsatisfied with his treating physician's prescribed treatment. Instead, Claimant was compelled to seek treatment from another physician because his treating physician refused him treatment. While refusal by a "claimant's physician" may not be imputed to an employer, I find such a refusal constitutes good cause for a change of physician. Therefore, in order to be entitled to medical benefits, Claimant need only show he tried to obtain approval from Employer to change physicians.

Following the disagreement with Dr. Volkman regarding treatment, Claimant requested approval from Employer to see another physician. Employer refused. After Claimant's initial appointment with Dr. Dempsey, Claimant informed Employer of Dr. Dempsey's recommended diagnostic tests and asked for authorization to undergo treatment with him. Employer told Claimant he could have the tests done, but Employer would not pay for them. Prior to his undergoing surgery with Dr. Dempsey, Claimant asked Employer once more for authorization to treat with Dr. Dempsey. Employer again refused. From these facts, it is clear that Claimant sought approval from Employer to change physicians. I find Claimant's request for approval to change physicians based on Drs. Volkman and West's refusal to treat him and Employer's subsequent refusals, entitles Claimant to medical benefits.

I further find Claimant conscientiously provided Employer with an updated status of his medical treatment throughout his claim. He sought treatment and care which the Act envisions that returned him to full duty in his former job with Employer. I find Employer's non-actions in this case perplexing, unreasonable and in non-conformity with the Act's mandate.

Besides being entitled to medical benefits for his treatment with Dr. Dempsey, I find Claimant is entitled to medical benefits and reimbursement for his treatment with Dr. Harris and for his treatment at Providence Hospital Emergency Room. Employer argues that since the ultrasound ordered by Dr. Harris showed no obvious cause of Claimant's complaints of pain it is not responsible for payment of Dr. Harris's services. According to Employer, the ultrasound along with Dr. Harris's request for tumor markers shows the test and treatment was not related to Claimant's work injury.

I find this argument unpersuasive. Claimant received an injury to his groin while performing his duties as an oiler. A diagnostic test of his groin was certainly appropriate to determine course of treatment. Although Dr. Harris requested tumor markers, Claimant testified he was not being treated for cancer and there is no information in the record to show otherwise. Moreover, Dr. Harris's notes indicate that although the ultrasound did not show an abnormality that might match Claimant's complaints of pain, Dr. Harris thought Claimant's pain might be caused by a neurological condition. Regardless of whether Claimant's groin pain was the result of a urological or neurological condition, the treatment he received from Dr. Harris was for his groin pains which resulted from his work-related accident.

In addition, Claimant was treated at the Providence Hospital Emergency Room following his work-related accident for an inability to urinate. Claimant contends Employer has not paid all medical expenses and costs related to his treatment at Providence. Employer offered no argument to illustrate why all medical expenses and costs had not been paid. Since Claimant's treatment at Providence was for his work-related injury and its residuals after referral by Dr. West, Employer is responsible for the payment of all related medical costs and expenses.

Therefore, I find Claimant is entitled to medical benefits under the Act for his treatment with Drs. Dempsey and Harris and Providence Hospital Emergency Room, including reimbursement of medical expenses and costs paid by him by personal check or credit card for services rendered by Drs. Dempsey and Harris as well as medial expenses and costs incurred by him for treatment at Providence Hospital Emergency Room.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Claimant was injured on July 8, 2004. Employer was notified of Claimant's injury that same day. Employer filed a Notice of Controversion with the District Director on July 23, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[11] Thus, Employer was liable for Claimant's disability compensation payment on July 22, 2004. Because Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by August 5, 2004, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on July 23, 2004, and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)". Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the

[11] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[12] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from July 8, 2004 to August 19, 2004 and from September 10, 2004 to January 4, 2005, based on Claimant's average weekly wage of $671.26, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. §908(b).

2. Employer is responsible for and shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's July 8, 2004, work injury, consistent with this Decision and Order to include treatment, care and surgery provided by Drs. Harris and Dempsey and Providence Hospital, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. §907.

3. Employer shall receive credit for all compensation heretofore paid, as and when paid.

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[12] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **April 13, 2005**, the date this matter was referred from the District Director.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. §1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 31st day of July, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge